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Supreme Court, U.S.
FILED
DEC 30 2008
OFFICE OF THE CLERK

No. 08-640

IN THE
Supreme Court of the United States

FEDERAL INSURANCE COMPANY, ET AL.,
Petitioners,

v.

KINGDOM OF SAUDI ARABIA, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS THE KINGDOM OF SAUDI ARABIA AND SAUDI HIGH COMMISSION

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December 30, 2008

QUESTION PRESENTED

Whether a plaintiff can use the "noncommercial torts" exception to sovereign immunity in the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. § 1605(a)(5), to sue a foreign state on allegations that it provided material support and resources for a terrorist act, when the U.S. government has *not* designated the foreign state as a state sponsor of terrorism and the plaintiff therefore cannot proceed under the FSIA's terrorism exception, *id.* § 1605A.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTRODUCTION 1

STATEMENT OF THE CASE 4

A. Petitioners' Allegations Against Saudi Arabia and the SHC 4

B. Proceedings Below 7

REASONS FOR DENYING THE PETITION 14

I. THE SECOND CIRCUIT'S CONCLUSION THAT PETITIONERS CANNOT PLEAD AROUND THE REQUIREMENTS OF THE TERRORISM EXCEPTION CREATES NO CONFLICT IN THE CIRCUITS 14

II. THE SECOND CIRCUIT CORRECTLY DECLINED TO PERMIT PETITIONERS TO PLEAD AROUND THE FSIA'S TERRORISM EXCEPTION BY INVOKING THE TORTS EXCEPTION 22

III. BECAUSE PETITIONERS CANNOT SATISFY THE TORTS EXCEPTION, THIS CASE IS AN UNSUITABLE VEHICLE TO ADDRESS WHETHER PETITIONERS CAN USE THAT EXCEPTION TO CIRCUMVENT THE TERRORISM EXCEPTION 27

CONCLUSION 32

TABLE OF AUTHORITIES

Page

CASES

Alberti v. Empresa Nicaraguense De La Carne, 705 F.2d 250 (7th Cir. 1983) 13-14, 24

Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428 (1989) 13

Asociacion de Reclamantes v. United Mexican States, 735 F.2d 1517 (D.C. Cir. 1984) 22, 27, 29

Boim v. Holy Land Found. for Relief & Dev., Nos. 05-1815 et al., 2008 WL 5071758 (7th Cir. Dec. 3, 2008) 28

Burnett v. Al Baraka Inv. & Dev. Corp., 292 F. Supp. 2d 9 (D.D.C. 2003) 16, 24, 31

Cabiri v. Government of Ghana, 165 F.3d 193 (2d Cir. 1999) 24

Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311 (1981) 24

Chuidian v. Philippine Nat'l Bank, 912 F.2d 1095 (9th Cir. 1990).....13, 24

de Sanchez v. Banco Cent. de Nicaragua, 770 F.2d 1385 (5th Cir. 1985) 13, 24

Doe v. bin Laden, 580 F. Supp. 2d 93 (D.D.C. 2008), *appeal pending*, No. 08-7117 (D.C. Cir.) 16

EEOC v. Arabian American Oil Co., 499 U.S. 244 (1991) 28

El-Hadad v. United Arab Emirates, 216 F.3d 29 (D.C. Cir. 2000) 21

First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba, 462 U.S. 611 (1983) 10

Flatow v. Islamic Republic of Iran, 999 F. Supp. 1 (D.D.C. 1998) 17

Garb v. Republic of Poland, 440 F.3d 579 (2d Cir. 2006) 13, 24

HCSC-Laundry v. United States, 450 U.S. 1 (1981) 24

Letelier v. Republic of Chile, 488 F. Supp. 665 (D.D.C. 1980) 16, 17

Liu v. Republic of China, 892 F.2d 1419 (9th Cir. 1989).....15, 16, 17

Martin v. Republic of South Africa, 836 F.2d 91 (2d Cir. 1987) 21

O'Bryan v. Holy See, Nos. 07-5078 & 07-5163, 2008 WL 4964143 (6th Cir. Nov. 24, 2008) 28

Persinger v. Islamic Republic of Iran, 729 F.2d 835 (D.C. Cir. 1984).....27, 28, 29, 30

Phoenix Consulting, Inc. v. Republic of Angola, 216 F.3d 36 (D.C. Cir. 2000) 11

Price v. Socialist People's Libyan Arab Jamahiriya, 294 F.3d 82 (D.C. Cir. 2002).....17, 18, 19, 20, 23, 25, 26

Small v. United States, 544 U.S. 385 (2005)..... 28

United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797 (1984) 9, 12, 30, 31

Vermeulen v. Renault, U.S.A., Inc., 985 F.2d 1534 (11th Cir. 1993)..... 21

Williams v. Taylor, 529 U.S. 362 (2000) 19, 24

CONSTITUTION AND STATUTES

U.S. Const. amend. V (Due Process Clause) 17

Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671 *et seq.* 30

Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1602 *et seq.* 2

28 U.S.C. § 1603(b) 10

28 U.S.C. § 1605(a)(2) 21

28 U.S.C. § 1605(a)(5) 8, 20, 21, 22, 24

28 U.S.C. § 1605(a)(5)(A) 9, 30

28 U.S.C. § 1605(a)(7) (2000 & Supp. I 2001) (repealed 2008) 8

28 U.S.C. § 1605A 8, 21, 23

28 U.S.C. § 1605A(a)(1) 20, 25

28 U.S.C. § 1605A(a)(2)(A)(i)(I) 26

28 U.S.C. § 1605A(a)(2)(A)(iii) 25

LEGISLATIVE MATERIALS

H.R. Rep. No. 94-1487 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604 ..... 22, 28

ADMINISTRATIVE MATERIALS

Office of the Press Secretary, *President Bush Discusses National Security, Homeland Security and the Freedom Agenda at U.S. Army War College* (Dec. 17, 2008), *available at* http://www.whitehouse.gov/news/releases/2008/12/20081217-6.html 7

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OTHER MATERIALS

European Convention on State Immunity, May 16, 1972, ETS No. 74, 11 I.L.M. 470, *available at* http://conventions.coe.int/Treaty/en/Treaties/Html/074.htm 29

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Report of the International Law Commission on the work of its thirty-sixth session, 7 May – 27 July 1984, U.N. GAOR, 39th Sess., Supp. No. 10, U.N. Doc. A/39/10 (1984), *available at* http://untreaty.un.org/ilc/documentation/english/A_39_10.pdf 29

INTRODUCTION

Following an exhaustive and authoritative investigation, the National Commission on Terrorist Attacks Upon the United States (the "9/11 Commission") concluded that the Kingdom of Saudi Arabia had no role in the attacks of September 11, 2001. The 9/11 Commission found that Saudi Arabia did *not* provide financial or material assistance to the September 11 terrorists or their al Qaeda organization: "Saudi Arabia has long been considered the primary source of al Qaeda funding, but we have found no evidence that the Saudi government as an institution or senior Saudi officials individually funded the organization." *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States* 171 (July 2004) (the "9/11 Report"). In keeping with their practice throughout this litigation, petitioners quote (at 4) only the first portion of this sentence, as if that were the finding of the 9/11 Commission, while omitting the Commission's actual finding that there was no evidence implicating respondents in the funding of al Qaeda.

Petitioners in these consolidated cases have named Saudi Arabia – along with several senior government officials and the Saudi High Commission ("SHC"), which is a Saudi agency that conducts humanitarian relief efforts abroad – among the more than 200 individuals, non-profits, financial institutions, foreign officials, and sovereign states they accuse of complicity in the September 11 attacks. Petitioners allege in the most conclusory terms that Saudi Arabia, both directly and through various charity "fronts" supposedly acting on its behalf, provided funding and other support to al Qaeda, and thereby facilitated

that organization's growth into a terrorist group capable of perpetrating the attacks of September 11.

The Second Circuit correctly determined that these claims are not cognizable in a U.S. court. As a "foreign state" within the meaning of the Foreign Sovereign Immunities Act of 1976 ("FSIA"), Saudi Arabia, along with its agencies and instrumentalities, is immune from suit unless one of the FSIA's exceptions to immunity applies. Here, Saudi Arabia is alleged to have provided material support for terrorism, so, as the Second Circuit recognized, the relevant exception is the FSIA's terrorism exception. That exception, however, applies only when the U.S. Department of State has designated the defendant state as a state sponsor of terrorism. The State Department has never so designated Saudi Arabia. To the contrary, the State Department has identified Saudi Arabia as a crucial *ally*, emphasizing that the United States and Saudi Arabia are "united in the war against terror."[1] As the Second Circuit held, petitioners cannot avoid that critical fact – and thus force an ally of the United States into the extraordinary posture of defending itself in a U.S. court against claims that it sponsored an act of terrorism against the United States – merely by recasting their terrorism claim as one arising under the torts exception to sovereign immunity.

The Second Circuit's decision creates no conflict among the courts of appeals. As the Second Circuit noted, its decision is consistent with those of multiple other courts of appeals that have recognized that a

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[1] *E.g.*, U.S. Dep't of State, Press Briefing With Saudi Arabian Foreign Minister Prince Saud Al-Faisal (Mar. 19, 2004) (statement of then-Secretary Colin L. Powell), *available at* http://www.state.gov/secretary/former/powell/remarks/30623.htm.

plaintiff may not circumvent the limitations in a specific exception to sovereign immunity by recasting its allegations as arising under another exception. The Second Circuit's decision is also correct: the plain text of the FSIA's terrorism exception reflects Congress's considered judgment that subjecting a foreign sovereign to allegations that it sponsored an act of terrorism against the United States carries with it sensitive foreign policy implications and should thus be undertaken only with the express sanction of the State Department. As the Second Circuit held, permitting petitioners to circumvent that key procedural safeguard – merely by recasting their state-sponsor-of-terrorism claims as tort claims – would read the terrorism exception out of the FSIA, in conflict with settled principles of statutory interpretation. Finally, this case is a poor vehicle to address the question petitioners seek to raise. As the district court held below, petitioners cannot in any event satisfy the torts exception they seek to invoke. In this case, accordingly, the question whether they can use that exception to circumvent the limitations in the terrorism exception is purely academic.

STATEMENT OF THE CASE

A. Petitioners' Allegations Against Saudi Arabia and the SHC

1. The crux of petitioners' allegations against Saudi Arabia is that the Saudi government, acting through senior officials and various entities supposedly acting on Saudi Arabia's behalf, provided financial and material assistance to al Qaeda and thereby assisted that organization's "growth and development into a sophisticated global terrorist network" capable of perpetrating the attacks of September 11. *See* First Am. Compl. ¶ 398, *Federal Ins. Co. v. al Qaida*, No. 03CV6978 (S.D.N.Y. filed Mar. 10, 2004) ("Compl."). The complaint alleges, for example, that Saudi Arabia provided al Qaeda with unspecified "financial, logisitcal [sic] and other support." *Id.* It further asserts, in equally conclusory terms, that Saudi Arabia "established, funded, managed, maintained, directed and controlled many of the ostensible charities and banks that operate within al Qaida's support infrastructure." *Id.* ¶ 399. And the complaint alleges, again without specification, that Saudi Arabia "appointed senior members of the al Qaida movement" to positions within charities that it supposedly controlled, thus "providing a cover for their terrorist activity." *Id.*[2]

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[2] Petitioners describe their complaint as including "exhaustive allegations and evidence of the Kingdom's rigid control of the operations and activities" of charities they characterize as having supported al Qaeda. Pet. 7. To support this characterization, they cite a laundry list of paragraphs from their complaint, the bulk of which use identical language to assert in conclusory terms that the Saudi government exercises control over various charities. *See, e.g.*, Compl. ¶¶ 85, 114, 131, 151, 168, 208 (using identical, conclusory language to assert that Saudi Arabia "controls and directs [the] operations," and

Petitioners also allege that French and U.S. government officials raised with Saudi officials their concern that Saudi charities were involved "in the sponsorship and funding of terrorist organizations." *Id.* ¶ 400. The complaint then contends that, despite international opposition, Saudi Arabia "continued to funnel enormous amounts of money and other resources to the charities supporting al Qaida's operations." *Id.* ¶ 401. Plaintiffs further assert, again without specification, that "the Kingdom . . . and members fo [sic] the Royal Family knew and intended that the funding and support funneled to al Qaida through the charities and banks would be used to attack U.S. interests." *Id.* ¶ 402.

Petitioners also seek to link Saudi Arabia to the September 11 attacks through support the Saudi government supposedly provided to the Taliban (which was at the time the *de facto* government of Afghanistan). *See id.* ¶¶ 403-407. Without that support, petitioners assert, al Qaeda would not have been able to grow into a network capable of conducting "large scale acts of terrorism on a global scale." *Id.* ¶ 409.

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provides "virtually all of [the] funding" for, six different charities that petitioners claim are al Qaeda "fronts"). None of the paragraphs that petitioners cite can accurately be characterized as including "exhaustive allegations" or "evidence." Petitioners properly decline to rely on the supposed evidence of Saudi control over charities that they submitted to the district court; respondents demonstrated to the court of appeals that this supposed "evidence" was in fact a collection of unsubstantiated, speculative assertions that in no way suggested that Saudi Arabia exercised control over the charity "fronts" that petitioners claim were responsible for funding al Qaeda. *See* Brief of Defendant-Appellee the Kingdom of Saudi Arabia at 47-51 & nn.14-15, *In re Terrorist Attacks on September 11, 2001*, Nos. 06-0319-CV(L) et al. (2d Cir. filed Jan. 5, 2007).

Petitioners do not allege any direct involvement by Saudi Arabia in the September 11 attacks, but rather assert without elaboration that those attacks were a "direct, intended and foreseeable product" of Saudi Arabia's purported support of al Qaeda. *Id.* ¶ 425.

The complaint also names as defendants the SHC and several other Saudi agencies that conduct humanitarian relief efforts in various parts of the world. Petitioners allege that each of those agencies provided funding and logistical support for al Qaeda. *See id.* ¶¶ 180-207.[3] Additional defendants include more than a half-dozen charities, including some organized and based in Saudi Arabia. *See id.* ¶¶ 84-179, 208-216. In contrast to the SHC and other agencies of the Saudi government named as defendants, these charities – which include, for example, the International Islamic Relief Organization and the Muslim World League – are not agencies or instrumentalities of Saudi Arabia, but rather are independent charities, some of which were based in Saudi Arabia and all of which are alleged to have "provided critical financial and logistical support to al Qaida." *E.g., id.* ¶¶ 128, 178.

2. Petitioners' claims against Saudi Arabia are directly rebutted by facts found by the U.S. government. As noted at the outset, the 9/11 Commission concluded that Saudi Arabia did *not* assist the September 11 terrorists. While not ruling out the possi-

[3] Petitioners admit that respondent the SHC has contributed more than $600 million to aid Bosnian Muslims impoverished by the recent civil war in Bosnia and Herzegovina (see Pet. App. 57a), but they also allege that $41 million collected by the SHC is unaccounted for (see Compl. ¶ 460) and leap to the conclusion that the SHC "has long acted as a fully integrated component of al Qaida's logistical and financial support infrastructure" (*id.* ¶ 182).

bility that some independent (non-sovereign) *charities* diverted funds to al Qaeda, the 9/11 Commission "found no evidence that the Saudi government as an institution or senior Saudi officials individually funded" al Qaeda. 9/11 Report at 171. The 9/11 Report further concluded that "we have seen no evidence that any foreign government – or foreign government official – supplied any funding" to the September 11 hijackers. *Id.* at 172.

The 9/11 Commission further stated that Saudi Arabia, together with the United States, is "locked in mortal combat with al Qaeda." *Id.* at 373. As far back as 1996, Osama bin Laden "condemned the Saudi monarchy for allowing the presence of [American troops] in a land with the sites most sacred to Islam." *Id.* at 48. Saudi Arabia itself thus became a target of al Qaeda because of its ties to the United States. Shortly thereafter, Saudi Arabia and the United States established a joint intelligence committee and worked together in an effort to stop al Qaeda. *See id.* at 115-22. As then-Secretary of State Powell remarked in 2004, the United States and Saudi Arabia are "united in the war against terror." *See supra* p. 2 & note 1.[4]

B. Proceedings Below

Saudi Arabia and the SHC each filed motions to dismiss asserting sovereign immunity under the FSIA. The district court granted both motions, and the Second Circuit, in a unanimous opinion, affirmed.

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[4] *See also* Office of the Press Secretary, *President Bush Discusses National Security, Homeland Security and the Freedom Agenda at U.S. Army War College* (Dec. 17, 2008) (statement of President George W. Bush) (describing Saudi Arabia as a "staunch ally in the war on terror"), *available at* http://www.whitehouse.gov/news/releases/2008/12/20081217-6.html.

1. With respect to Saudi Arabia's motion, the district court began by explaining that, "[u]nder the FSIA, a foreign state and its instrumentalities are presumed immune from United States courts' jurisdiction" and that "[t]he FSIA's exceptions to immunity provide the sole basis for obtaining subject matter jurisdiction over a foreign state and its instrumentalities." Pet. App. 122a. Because "[t]here [wa]s no dispute that the Kingdom of Saudi Arabia is a foreign state," *id.* at 165a, the court addressed the relevant FSIA exceptions to determine whether it could exercise jurisdiction.

The district court first addressed the FSIA's state-sponsor-of-terrorism exception, which provides for jurisdiction in terrorism cases against foreign states that the U.S. State Department has designated as "state sponsor[s] of terrorism." 28 U.S.C. § 1605A.[5] The court determined that this exception does not apply because Saudi Arabia "has not been designated a state sponsor of terrorism." Pet. App. 147a.

The district court also addressed the FSIA's "non-commercial torts" exception. *See* 28 U.S.C. § 1605(a)(5). Saudi Arabia contended that the torts exception does not apply to claims based on alleged support for terrorism. Construing it to apply to such claims, Saudi Arabia pointed out, would permit petitioners to make an end-run around the terrorism exception and the limits that Congress placed on that exception.

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[5] At the time this case was initiated, the state-sponsor-of-terrorism exception was codified at 28 U.S.C. § 1605(a)(7) (2000 & Supp. I 2001). During the pendency of the Second Circuit appeal, § 1605(a)(7) was repealed and replaced with 28 U.S.C. § 1605A. Consistent with the Second Circuit's decision and the petition, *see* Pet. App. 30a n.13, Pet. 2 n.1, respondents in this brief refer to § 1605A.

The court rejected that argument but nevertheless concluded that petitioners' claims do not fit within the torts exception.

The district court stressed that the torts exception does not establish jurisdiction over discretionary actions. *See* Pet. App. 167a; 28 U.S.C. § 1605(a)(5)(A). The court explained that petitioners' allegations with respect to Saudi Arabia "arise predominantly" from claims that the Saudi government "aided and abetted the terrorists" by supporting charities purportedly "under the Kingdom's control." Pet. App. 165a-166a (internal quotation marks omitted). The court observed that "conclusory . . . allegations" cannot support jurisdiction under the FSIA, and it concluded that Saudi Arabia's "treatment of and decisions to support Islamic charities are purely planning level 'decisions grounded in social, economic, and political policy'" and are therefore outside the scope of the torts exception. *Id.* at 167a (quoting *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 814 (1984)). Because petitioners could not satisfy the torts exception (or any other FSIA exception), the court granted Saudi Arabia's motion to dismiss.

The district court reached the same result with respect to the SHC. In contrast to petitioners' indiscriminate discussion of undifferentiated "charities" that they characterize as al Qaeda "fronts," *see* Pet. 4-7, the court carefully considered the evidence and allegations specifically relating to the SHC (which is the one Saudi entity among the many "charities" that petitioners address[4]).

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[4] Petitioners conflate the SHC, which is an agency of the Saudi government, with unnamed charity "fronts," which are

The district court first considered whether the SHC is an "organ, agency, or instrumentality" of Saudi Arabia and is therefore entitled to sovereign immunity under the FSIA. *See* Pet. App. 64a-69a; 28 U.S.C. § 1603(b). To resolve that question, the court gave "great weight" to affidavits submitted by the SHC regarding its status and mission. Pet. App.

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not. *See* Pet. 6-7. They assert, for example, that the SHC "admitted" that it is an agency and instrumentality of the Saudi government, and they further claim that "several" unidentified charities likewise "acknowledged in district court pleadings that they are instrumentalities of the Saudi Government." Pet. 7. As explained in the text, the SHC in fact *proved*, over the opposition of some petitioners, that it is an "agency or instrumentality" of the Saudi government and is therefore entitled to sovereign immunity under the FSIA. *See* 28 U.S.C. § 1603(b). Petitioners' reference to the "acknowledg[ment]" of "several" *other* charities, by contrast, refers to answers filed by two charities (the International Islamic Relief Organization ("IIRO") and the Muslim World League ("MWL")) in which those entities noted *petitioners' allegations* that the charities were instrumentalities of Saudi Arabia and, without admitting those allegations, pleaded in the alternative that, if petitioners were correct, the charities were entitled to sovereign immunity under the FSIA. *See* Def. MWL's Answer to First Am. Compl. at 66, *Federal Ins. Co. v. al Qaida*, No. 03CV6978 (S.D.N.Y. filed July 30, 2004); Def. IIRO's Am. Answer to Pls.' First Am. Compl. at 66, *Federal Ins. Co. v. al Qaida*, No. 03CV6978 (S.D.N.Y. filed Dec. 13, 2005). Saudi Arabia, however, has made clear that these entities are not instrumentalities of the Kingdom. *See* Reply in Support of Mot. To Dismiss of the Kingdom of Saudi Arabia at 2, *Federal Ins. Co. v. al Qaida*, Nos. 03CV6978 & 03CV8591 (S.D.N.Y. filed Oct. 15, 2004). Moreover, and contrary to petitioners' apparent understanding, even if these two entities were instrumentalities of Saudi Arabia, their conduct would not be attributable to the Kingdom (or the SHC). *See First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 626-27 (1983) ("[G]overnment instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such").

65a (internal quotation marks omitted); *see Phoenix Consulting, Inc. v. Republic of Angola*, 216 F.3d 36, 40 (D.C. Cir. 2000) (in FSIA context, "[w]hen the defendant has . . . challenged the factual basis of the court's jurisdiction, . . . the court must go beyond the pleadings and resolve any disputed issues of fact the resolution of which is necessary to a ruling upon the motion to dismiss"). Relying on those affidavits, the court held that the SHC made a "prima facie showing that it is a foreign sovereign" and is therefore entitled to sovereign immunity: it was formed by order of the Saudi governing body, it provides Saudi Arabia's aid to Bosnia, it is governed by a Saudi official, and its employees are civil servants. Pet. App. 67a-68a.

Turning to the FSIA's exceptions, the district court concluded that the torts exception "is the only exception relevant to the allegations" against the SHC, and, as with Saudi Arabia itself, it further held that petitioners' allegations are insufficient to overcome discretionary-function immunity. *Id.* at 69a-70a, 72a-73a. Relying on "undisputed evidence" submitted by the SHC, the court held that the SHC's decisions regarding the distribution of humanitarian funds were discretionary and that it was guided by the Kingdom's policies regarding foreign aid in making funding determinations. *Id.* at 72a. The undisputed evidence on which the court relied included the declaration of Saud bin Mohammad Al-Roshood, the Director of the Executive Office of the SHC. *See* C.A. App. A2516-21. Mr. Al-Roshood submitted uncontradicted evidence that the SHC is a legitimate humanitarian organization and that, contrary to petitioners' wholly unsupported allegation that SHC funds were diverted to al Qaeda, Bosnian authorities

audited the disbursements of funds by the SHC in 1998, 1999, 2000, and 2001 and found nothing amiss. *See id.* at A2204, A2518-19, A2521. The court held that "SHC's alleged misuse of funds and/or inadequate record-keeping – even if it resulted in the funds going to terrorists – was the result of a discretionary function and cannot be the basis for overcoming SHC's immunity." Pet. App. 72a (quoting *Varig Airlines*, 467 U.S. at 814).

2. The Second Circuit, in a unanimous opinion authored by Chief Judge Jacobs, affirmed. Like the district court, the court of appeals began with the undisputed fact that Saudi Arabia (and its agencies and instrumentalities) is entitled to sovereign immunity unless one of the FSIA's exceptions applies. Pet. App. 12a. Noting that all of petitioners' allegations involve "providing material support to terrorists," the court emphasized that the FSIA's state-sponsor-of-terrorism exception "governs precisely those activities." *Id.* at 28a. That exception, however, includes a "key limitation": it is applicable only where the State Department has designated the defendant as a "state sponsor of terrorism." *Id.* at 31a. Because "[t]he State Department has never designated the Kingdom a state sponsor of terrorism . . . , the [t]errorism [e]xception is inapplicable here." *Id.*

The court of appeals then turned to the torts exception and explained that "to apply [that] [e]xception where the conduct alleged amounts to terrorism within the meaning of the [t]errorism [e]xception would evade and frustrate that key limitation on the [t]errorism [e]xception." *Id.* The torts exception, the court explained, was originally enacted in 1976 to cover personal injuries resulting from "'traffic accidents and other torts committed in the United

States, for which liability is imposed under domestic tort law.'" *Id.* at 27a (quoting *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 439-40 (1989)). The terrorism exception, by contrast, specifically covers harms resulting from acts of terrorism, and it sets up "[a]n important procedural safeguard – that the foreign state be designated a state sponsor of terrorism" in order to be subject to suit in a U.S. court. *Id.* at 31a. "By definition," the court stressed, "the acts listed in the [t]errorism [e]xception are torts." *Id.* "If the [t]orts [e]xception covered terrorist acts and thus encompassed the conduct set forth in the [t]errorism [e]xception, there would be no need for plaintiffs ever to rely on the [t]errorism [e]xception when filing suit." *Id.* That result, in turn, would allow plaintiffs to bypass the strict "procedural safeguard" of the terrorism exception by suing a non-designated government entity or official under the torts exception, and would thus "read the statute in a way that would deprive the [t]errorism [e]xception (or its limitations) of meaning." *Id.* at 31a-32a.

The court of appeals noted that its decision – insofar as it refused to permit petitioners to circumvent the limitations in the terrorism exception by casting their claims as arising under the torts exception – was consistent with prior decisions of the Second Circuit and its "sister circuits," which "have repeatedly rejected efforts to shoehorn a claim properly brought under one exception into another." *Id.* at 32a (citing *Garb v. Republic of Poland*, 440 F.3d 579, 588 (2d Cir. 2006); *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1106 (9th Cir. 1990); *de Sanchez v. Banco Cent. de Nicaragua*, 770 F.2d 1385, 1399 (5th Cir. 1985); *Alberti v. Empresa Nica-*

raguense De La Carne, 705 F.2d 250, 254 (7th Cir. 1983)).[7]

REASONS FOR DENYING THE PETITION

The Second Circuit's holding that petitioners cannot use the torts exception to circumvent the procedural safeguards of the FSIA's terrorism exception creates no conflict in the circuits and is correct. Even if that were not the case, the Court should deny certiorari because this case would be a poor vehicle to address the question, insofar as petitioners cannot in any event satisfy the torts exception that they attempt to invoke.

I. THE SECOND CIRCUIT'S CONCLUSION THAT PETITIONERS CANNOT PLEAD AROUND THE REQUIREMENTS OF THE TERRORISM EXCEPTION CREATES NO CONFLICT IN THE CIRCUITS

Petitioners' claims against respondents are based on the allegation that respondents "direct[ed] significant financial and logistical support to al Qaeda" and the theory that, as a result, respondents are culpable for the September 11 attacks. Pet. 4. As the Second Circuit held, the FSIA's state-sponsor-of-terrorism exception "governs precisely those activities," but it is unavailable here because Saudi Arabia has not been designated as a state sponsor of terrorism. Pet. App. 28a. The Second Circuit further held that petitioners cannot avoid that fact – and thereby circumvent the

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[7] The Second Circuit likewise affirmed the district court's conclusion that the SHC is an agency or instrumentality of Saudi Arabia and therefore entitled to sovereign immunity under the FSIA. *See* Pet. App. 22a-26a. Petitioners do not challenge that conclusion here; indeed, they pretend that the SHC's victory on this question was somehow an "admi[ssion]" against interest by the SHC. Pet. 7.

"key limitation" in the terrorism exception – by recasting their allegations as arising under the noncommercial torts exception. *Id.* at 31a. To do so would "read the statute in a way that would deprive the [t]errorism [e]xception (or its limitations) of meaning." *Id.* at 31a-32a. Contrary to petitioners' claims, that holding creates no conflict – in either result or methodology – with other courts of appeals.

Petitioners assert a conflict with the Ninth Circuit's decision in *Liu v. Republic of China*, 892 F.2d 1419 (9th Cir. 1989), which they claim holds that the torts exception "expressly authorizes claims based on acts of terrorism in the United States." Pet. 22. Contrary to petitioners' characterization, however, *Liu* involved no allegations of terrorism. Rather, in *Liu*, an official in China's Defense Intelligence Bureau was alleged to have ordered two individuals to kill a U.S. resident. *See* 892 F.2d at 1422-23. Although petitioners assert that "[t]here can be no doubt" that such an allegation amounts to a terrorism claim arising under the terrorism exception, Pet. 22 n.10, the court of appeals did not view it that way. On the contrary, the Ninth Circuit's discussion of the allegations at issue in *Liu* includes no reference to terrorism, and indeed the terrorism exception (the original version of which was added to the FSIA in 1996) did not even exist at the time *Liu* was decided. The *Liu* court thus had no occasion to consider the question the Second Circuit addressed – *i.e.*, whether a plaintiff can use the torts exception to plead around limitations in the terrorism exception. There is therefore no reason to believe this case would have come out differently had it been litigated in the Ninth Circuit, and thus no basis for this Court's intervention.

Petitioners' claim of a conflict between the Second Circuit's decision and the federal district court for the District of Columbia is likewise unavailing. *See* Pet. 22-23. In *Burnett v. Al Baraka Investment & Development Corp.*, 292 F. Supp. 2d 9 (D.D.C. 2003), the federal district court for the District of Columbia ruled, consistent with the Second Circuit in this case, that it would do violence to the FSIA's statutory scheme to permit a plaintiff to proceed under the torts exception in a case alleging the "provision of material support or resources" in support of a terrorist act, where it is the terrorism exception that specifically provides a cause of action for such activity. *See id.* at 20 & n.5.

Petitioners ignore the *Burnett* decision – which arose in this very case, before the Judicial Panel on Multidistrict Litigation transferred the case to the Southern District of New York – and point instead to a recent interlocutory ruling, now on appeal, in which a different federal district judge for the District of Columbia concluded, without acknowledging *Burnett* or the Second Circuit's decision in this case, that a complaint alleging terrorist activities by Afghanistan might be able to go forward under the torts exception, depending on the evidence the plaintiff is able to adduce. *See* Pet. 22-23 (citing *Doe v. bin Laden*, 580 F. Supp. 2d 93 (D.D.C. 2008), *appeal pending*, No. 08-7117 (D.C. Cir.)). At most, petitioners have identified tension between two decisions in a single federal district court, not a circuit split worthy of this Court's attention.[8]

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[8] Petitioners' reliance (at 23) on the D.C. district court's decision in *Letelier v. Republic of Chile*, 488 F. Supp. 665 (D.D.C. 1980), fails for the same reason as does their reliance on the Ninth Circuit's decision in *Liu* – neither case involved claims

Nor is the Second Circuit's decision in conflict with the D.C. Circuit's decision in *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 88 (D.C. Cir. 2002), which the Second Circuit in fact quoted in support of its decision. *See* Pet. 23-24; *compare* Pet. App. 31a. Like this case, and unlike *Liu*, *Price* did involve a terrorism claim – there, plaintiffs alleged hostage taking and torture. The key difference in *Price*, however, was that the allegations were leveled against Libya, which had been designated as a state sponsor of terrorism and thus could be sued under the terrorism exception. *See* 294 F.3d at 89. *Price* thus did not address whether plaintiffs could plead around the limitations in the terrorism exception by invoking the torts exception – unlike the plaintiffs here, the plaintiffs in *Price* had no need to circumvent the terrorism exception. Rather, the court in *Price* examined only (i) whether the complaint in that case stated a claim for hostage taking and torture under the terrorism exception as it was codified at the time, and (ii) whether Libya, as a foreign state, could claim that it was not subject to personal jurisdiction. *See id.* at 85.[9] As in *Liu*, the

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that the defendants engaged in or supported terrorist acts, and thus neither court had occasion to address the issue resolved by the Second Circuit. The sentence from *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1, 15 (D.D.C. 1998), on which petitioners rely (at 23) is both dictum and incorrect: it reads *Liu* and *Letelier* as involving "state-sponsored terrorist acts," when the decisions themselves make no such suggestion.

[9] The court in *Price* held that the complaint did not adequately allege hostage taking and torture (though it remanded to permit the plaintiff to amend as to the latter), *see* 294 F.3d at 91-95, and it further held that Libya is not a "person" within the meaning of the Due Process Clause and that the Constitution therefore did not pose an obstacle to the lower court's exercise of personal jurisdiction, *see id.* at 95-100.

D.C. Circuit had no occasion to determine whether a plaintiff can circumvent the limitations in the terrorism exception by invoking the torts exception.

Petitioners highlight (and characterize as a "holding") a single sentence from the background section of *Price* in which the court stated that, "[u]nder the original FSIA, . . . terrorism, torture, and hostage taking committed abroad were immunized forms of state activity." *Id.* at 88; *see* Pet. 23. Petitioners infer from that statement that the FSIA's terrorism exception – which they say was intended to provide a remedy for acts of terrorism where none previously existed – is confined to terrorist acts occurring outside U.S. borders, while terrorism committed inside U.S. borders is and always has been covered by the torts exception. *See* Pet. 23-24. But the D.C. Circuit held no such thing, and for good reason.

In enacting the terrorism exception, Congress included no geographic restrictions on the scope of that exception that would suggest it applies only if the terrorist act occurs outside the United States. Rather, Congress, far from focusing on geography, "sought to create a judicial forum for compensating the victims of terrorism, and in so doing to punish foreign states who have committed or sponsored such acts and deter them from doing so in the future." *Price*, 294 F.3d at 88-89. Indeed, quoting *Price* itself, petitioners concede that "'the only required link between the defendant nation and the territory of the United States is the nationality of the claimant,'" *not* the location of the alleged act. Pet. 24 (quoting *Price*, 294 F.3d at 90).

Petitioners also claim a conflict with *Price* insofar as the Second Circuit recognized that forcing an ally to stand trial on allegations that it sponsored a

terrorist attack on U.S. soil implicates "separation of powers" concerns and "diplomatic sensitivities." Pet. 24. In petitioners' view, *Price* stands for the proposition that such concerns and sensitivities arise only where a foreign state is accused of "*extraterritorial*" or "*overseas*" acts – *i.e.*, acts undertaken outside U.S. borders. *Id.* (citing *Price*, 294 F.3d at 89).

This claim is doubly flawed. First, the Second Circuit's decision rests primarily on pure statutory interpretation, not on the "separation of powers" concerns and "diplomatic sensitivities" that petitioners contend were highlighted in *Price*. The court below stressed that petitioners' allegations fit squarely under the terrorism exception, and it observed that, "[b]y definition, the acts listed in the [t]errorism [e]xception are torts." Pet. App. 31a. "If the [t]orts [e]xception covered terrorist acts," the court concluded, "there would be no need for plaintiffs ever to rely on the [t]errorism [e]xception when filing suit." *Id.* The court thus "decline[d] to read the statute in a way that would deprive the [t]errorism [e]xception (or its limitations) of meaning," *id.* at 31a-32a, and it drew support for its decision from the "'cardinal principle of statutory construction that we must give effect, if possible, to every clause and word of a statute,'" *id.* at 32a (quoting *Williams v. Taylor*, 529 U.S. 362, 404 (2000)), as well as from numerous cases that have "rejected efforts to shoehorn a claim properly brought under one exception into another," *id.* (citing cases from the Second, Fifth, Seventh, and Ninth Circuits).

Second, and in any event, this case presents the very "separation of powers" concerns and "diplomatic sensitivities" that, according to petitioners, the D.C. Circuit highlighted in *Price*. Petitioners take the

view that, under *Price*, such concerns and sensitivities are implicated only where a plaintiff sues a foreign state for acts undertaken outside the United States. But *all* of the conduct that Saudi Arabia, along with its officials and instrumentalities, is alleged to have undertaken in this case – its supposed provision of funding and logistical support of al Qaeda, its alleged support of the Taliban, and its purported funding and control of various charities – took place outside U.S. borders; indeed, the bulk of that supposed conduct by definition took place in Saudi Arabia itself. Thus, even if *Price* supported petitioners' distinction between acts undertaken within and outside U.S. borders – which in fact it does not – the case would not help petitioners here, because the very "separation of powers" concerns and "diplomatic sensitivities" that petitioners acknowledge are implicated by suing a foreign state for actions allegedly taken "*overseas*" are present here.

Finally, petitioners claim "tension" between the Second Circuit's reading of the language "not otherwise covered by this chapter" in the terrorism exception, *see* Pet. App. 32a-33a (citing § 1605A(a)(1)), and other circuits' reading of the language "not otherwise encompassed in paragraph (2)" (the commercial activities exception) in the noncommercial torts exception (§ 1605(a)(5)). *See* Pet. 25-26. There is no such tension. The Second Circuit read the clause "not otherwise covered by this chapter" to mean that the terrorism exception "stands alone," and it elaborated that, "[i]f acts of terrorism are considered torts for the purposes of the [t]orts [e]xception, then any claim that could be brought under the [t]errorism [e]xception could also be brought under the [t]orts [e]xception." Pet. App. 33a. "If this were so," the court continued,

"the [t]errorism [e]xception would be drained of all force because every potential case would be 'otherwise covered by this chapter' – namely, the [t]orts [e]xception." *Id.*

Contrary to petitioners' assertion, that explanation – of a statutory clause that was first enacted in January 2008 as part of the new § 1605A – has nothing to do with the different interplay, based on different statutory language, between the noncommercial torts exception and the commercial activities exception that is the subject of the cases that petitioners cite. *See, e.g., El-Hadad v. United Arab Emirates*, 216 F.3d 29, 35 (D.C. Cir. 2000) (concluding, in part based on the language "not otherwise encompassed in paragraph (2)" in § 1605(a)(5), that a claim arising under the "commercial activities" exception (§ 1605(a)(2)) was not subject to a limitation in the "noncommercial torts" exception (§ 1605(a)(5)). Indeed, one of the cases on which petitioners rely in this respect cites a Second Circuit case to support its conclusion that personal injuries arising out of commercial activities are cognizable under the "commercial activities" exception rather than the "noncommercial torts" exception, thus confirming that there is no conflict between or among the circuits on this point. *See Vermeulen v. Renault, U.S.A., Inc.*, 985 F.2d 1534, 1544 n.13 (11th Cir. 1993) (citing *Martin v. Republic of South Africa*, 836 F.2d 91, 93 (2d Cir. 1987)).

II. THE SECOND CIRCUIT CORRECTLY DECLINED TO PERMIT PETITIONERS TO PLEAD AROUND THE FSIA'S TERRORISM EXCEPTION BY INVOKING THE TORTS EXCEPTION

The Second Circuit's decision, apart from creating no conflict with other courts of appeals, is also correct. "The primary purpose of the 'tortious act or omission' exception of § 1605(a)(5) was to enable officials and employees of foreign sovereigns to be held liable for the traffic accidents which they cause in this country, whether or not in the scope of their official business." *Asociacion de Reclamantes v. United Mexican States*, 735 F.2d 1517, 1525 (D.C. Cir. 1984) (Scalia, J.) (citing H.R. Rep. No. 94-1487, at 20-21 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6619-20); *see* Pet. App. 27a-28a. As the Second Circuit recognized, to construe that exception to reach allegations that a foreign state provided material support to a terrorist group would expand the provision far beyond its intended scope and permit petitioners to plead around the terrorism exception and its procedural safeguards. That result, in turn, would render the terrorism exception a dead letter, in conflict with basic principles of statutory interpretation.

The limitations in the terrorism exception are clearly defined: plaintiffs may pursue an action against a foreign state for providing "material support or resources" to terrorist groups, but only where (i) the plaintiff (or the victim) is a U.S. national, member of the armed forces, or a U.S. government employee, (ii) the plaintiff has afforded the defendant foreign state the opportunity to arbitrate (if the terrorist act occurred in the foreign state), and (iii) the defendant foreign state has been designated a state sponsor

of terrorism. 28 U.S.C. § 1605A. These limitations are critical to the proper implementation of the FSIA. As the Second Circuit stressed, the Executive Branch "'resisted'" passage of a terrorism exception, "fear[ing] that such an amendment to the FSIA 'might cause other nations to respond in kind, thus potentially subjecting the American government to suits in foreign countries for actions taken in the United States.'" Pet. App. 31a (quoting *Price*, 294 F.3d at 89). "The resulting provision bore 'notable features which reveal the delicate legislative compromise out of which it was born,' the primary one being that it applie[s] only to designated state sponsors of terrorism." *Id.* (same) (internal citation omitted).

Petitioners, however, seek to disregard that limitation and proceed against Saudi Arabia under the torts exception, even though Saudi Arabia has not been designated as a state sponsor of terrorism. As the Second Circuit recognized, permitting petitioners to do so "would deprive the [t]errorism [e]xception ([and] its limitations) of meaning." *Id.* at 31a-32a. In amending the FSIA to add the terrorism exception, Congress balanced the interest in providing a remedy to victims of terrorist acts against the profound policy implications of adjudicating claims in a U.S. court against a foreign state based on accusations that the foreign state supported a terrorist act. Congress struck that balance by authorizing suits in specifically defined circumstances, and *only* where the State Department has designated the defendant foreign state as a state sponsor of terrorism. "By definition, the acts listed in the [t]errorism [e]xception are torts." *Id.* at 31a. To allow petitioners to pursue their terrorism claims under the torts exception – which petitioners invoke only because

they cannot proceed against Saudi Arabia under the terrorism exception – would "drain[]" the terrorism exception "of all force." *Id.* at 33a.[10]

In refusing to permit that result, the Second Circuit adhered to settled principles of statutory interpretation. This Court has long recognized that "compliance with the intent of Congress cannot be avoided by mere artful pleading." *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 324 (1981). Indeed, as the Second Circuit emphasized, in the FSIA context in particular, the federal courts of appeals have uniformly and repeatedly "rejected efforts to shoehorn a claim properly brought under one exception into another." Pet. App. 32a (citing *Garb*, 440 F.3d at 588; *Chuidian*, 912 F.2d at 1106; *de Sanchez*, 770 F.2d at 1399; *Alberti*, 705 F.2d at 254); *see also Cabiri v. Government of Ghana*, 165 F.3d 193, 200 (2d Cir. 1999) (rejecting plaintiffs' "effort to plead around" an exclusion from the torts exception by recasting claim arising out of misrepresentation as the intentional infliction of emotional distress). Moreover, courts "must give effect, if possible, to every clause and word of a statute," *Williams*, 529 U.S. at 404 (internal quotation marks omitted), and "a specific statute . . . controls over a general provision . . . , particularly when the two are interrelated and closely positioned," *HCSC-Laundry v. United States*, 450 U.S. 1, 6 (1981) (per curiam).

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[10] Furthermore, whereas the terrorism exception authorizes actions against state sponsors of terrorism for the "provision of material support or resources" in support of a terrorist act, the noncommercial torts exception includes no such language. *See Burnett*, 292 F. Supp. 2d at 20 & n.5. Congress's omission of the "provision of material support or resources" as an act giving rise to liability under § 1605(a)(5) "should be treated as intentional." *Id.*

By refusing to permit petitioners to "shoehorn" their terrorism claim into the torts exception through artful pleading, the Second Circuit ensured that the specific safeguards Congress built into the terrorism exception would have meaning, consistent with the language and structure of the statute.

Petitioners do not appear to dispute the Second Circuit's reasoning that, *if* the terrorism exception applies to their allegations, they can proceed against Saudi Arabia (if at all) only under that exception, and not under the torts exception. Instead, petitioners claim that the terrorism exception does not apply to their allegations, because that exception was "meant to authorize claims for harm caused principally *outside* the United States." Pet. 2. But, as noted above, and contrary to petitioners' assertion, the language of the terrorism exception is in no way confined to terrorist acts occurring outside the United States. On the contrary, the exception broadly applies in cases "in which money damages are sought against a foreign state for personal injury or death that was caused by" a series of terrorist acts "or the provision of material support or resources for such an act," 28 U.S.C. § 1605A(a)(1). In fact, as noted above, petitioners acknowledge that "'the only required link between the defendant nation and the territory of the United States is the nationality of the claimant,'" not the location of the alleged act. Pet. 24 (quoting *Price*, 294 F.3d at 90). Furthermore, the statute includes a mandatory arbitration requirement that applies only if "the act occurred in the foreign state against which the claim has been brought," 28 U.S.C. § 1605A(a)(2)(A)(iii), making clear that Congress understood how to confine the geographic coverage of the terrorism exception where it desired that result.

Petitioners themselves are proceeding in this very litigation pursuant to the terrorism exception against those defendants that have been designated as state sponsors of terrorism,[11] confirming their understanding that the terrorism exception does in fact cover their claims in this case.

Petitioners also complain that, if terrorism claims against foreign states can be brought only under the terrorism exception, "only the handful of countries designated as state sponsors of terrorism and their agencies can be sued for supporting acts of terrorism undertaken in the United States." Pet. 20. That fact, however, reflects the FSIA's "delicate legislative compromise," *Price*, 294 F.3d at 89 – *i.e.*, Congress's decision to create an Executive Branch check on actions in U.S. courts accusing foreign states of supporting terrorism against U.S. nationals. Moreover, petitioners ignore that the terrorism exception permits plaintiffs to proceed against foreign states that are designated as state sponsors of terrorism *after* the act takes place, in the event the Executive Branch determines that the foreign state had a hand in the act in question. *See* 28 U.S.C. § 1605A(a)(2)(A)(i)(I) (authorizing actions against foreign states "designated [as a state sponsor of terrorism] as a result of such act"). Thus, if the U.S. government had found credi-

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[11] *See, e.g.*, Third Am. Compl. ¶¶ 17-18, *O'Neill v. Republic of Iraq*, No. 04CV1076 (S.D.N.Y. filed May 25, 2005) (asserting that terrorism exception gives court jurisdiction over Iran and Iraq); First Am. Compl. ¶ 47, *New York Marine & Gen. Ins. Co.*, No. 04CV6105 (S.D.N.Y. filed Dec. 23, 2004) (claiming jurisdiction over, *inter alia*, Iran, Iraq, Sudan, and Syria); Pls.' Mot. for J. by Default Against Sovereign Defs. at 1 & Exh. H ¶ 4, *Havlish v. Bin-Laden*, No. 03CV9848 (S.D.N.Y. filed Aug. 29, 2008) (seeking default judgment against Iran and its instrumentalities; asserting liability based on terrorism exception).

ble evidence to support petitioners' allegations that Saudi Arabia was complicit in the attacks of September 11 and had designated Saudi Arabia as a state sponsor of terrorism as a result, petitioners would have been able to pursue their claims in a U.S. court. Of course, as explained above, the 9/11 Commission found the opposite, and the State Department, far from designating Saudi Arabia as a state sponsor of terrorism, has identified Saudi Arabia as a key ally in the war on terror.

III. BECAUSE PETITIONERS CANNOT SATISFY THE TORTS EXCEPTION, THIS CASE IS AN UNSUITABLE VEHICLE TO ADDRESS WHETHER PETITIONERS CAN USE THAT EXCEPTION TO CIRCUMVENT THE TERRORISM EXCEPTION

Finally, and in all events, this case is a poor vehicle to address whether a plaintiff accusing a foreign state of providing material support for terrorism can circumvent the FSIA's terrorism exception by invoking the torts exception instead. That is because, as the district court held below, petitioners cannot satisfy the torts exception. As a result, the question petitioners seek to raise is purely academic.

A. The torts exception is inapplicable here, first, because the actions Saudi Arabia and the SHC supposedly took to support al Qaeda all took place outside the United States. To fall within the torts exception, the allegedly tortious activity itself, not just the injury that results from it, must occur in the United States.

Two D.C. Circuit opinions, including one by then-Judge Scalia, are express on this point, and the Sixth Circuit likewise agrees. *See Asociacion de Reclamantes*, 735 F.2d at 1524 (Scalia, J.); *Persinger v. Islamic*

Republic of Iran, 729 F.2d 835, 842 (D.C. Cir. 1984); *O'Bryan v. Holy See*, Nos. 07-5078 & 07-5163, 2008 WL 4964143, at *13, *16 (6th Cir. Nov. 24, 2008). As the D.C. Circuit explained, although the text of the torts exception is "ambiguous on this point," the ambiguity "goes no deeper than the surface of the text, . . . for the briefest consideration of the purposes of the statute shows that . . . both the tort and the injury must occur in the United States." *Persinger*, 729 F.2d at 840. In enacting the torts exception, "Congress' principal concern was with torts committed in this country" – as noted above, primarily "'traffic accidents.'" *Id.* at 840, 842 (quoting H.R. Rep. No. 94-1487, at 20-21, *reprinted in* 1976 U.S.C.C.A.N. at 6619-20); *see O'Bryan*, 2008 WL 4964143, at *13. By contrast, "[i]f Congress had meant to remove sovereign immunity for governments acting on their own territory, with all of the potential for international discord and for foreign government retaliation that that involves, it is hardly likely that Congress would have ignored those topics and discussed instead automobile accidents in this country." *Persinger*, 729 F.2d at 841.[12] Moreover, limiting the torts exception to acts occurring in the United States aligns with "codifications by other nation-states and international organizations – with which Congress sought to be consistent" and which "have provided that a state loses its sovereign immunity for tortious acts only

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[12] *Cf. Boim v. Holy Land Found. for Relief & Dev.*, Nos. 05-1815 et al., 2008 WL 5071758, at *3 (7th Cir. Dec. 3, 2008) (en banc) ("Congress has the power to impose liability for acts that occur abroad but have effects within the United States, but it must make the extraterritorial scope of a statute clear.") (citing, *inter alia*, *Small v. United States*, 544 U.S. 385, 388-89 (2005); *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991)) (internal citation omitted).

where they occur in the territory of the forum state." *Id.* at 840.[13]

This reading also accords with the statutory structure. Although the text of the torts exception is "susceptible of the interpretation that only the effect of the tortious action need occur here, where Congress intended such a result elsewhere in the FSIA it said so more explicitly." *Asociacion de Reclamantes*, 735 F.2d at 1524. In the commercial activities exception, Congress withheld immunity for "a foreign sovereign's commercial activities 'outside the territory of the United States' having a 'direct effect' inside the United States." *Persinger*, 729 F.2d at 843. By contrast, "[a]ny mention of 'direct effect[s]' is noticeably lacking from the noncommercial tort exception." *Id.* (second alteration in original). "When Congress uses explicit language in one part of a statute to cover a particular situation and then uses different language in another part of the same statute, a strong inference arises that the two provisions do not mean the same thing." *Id.*

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[13] *See* European Convention on State Immunity, May 16, 1972, art. 11, ETS No. 74, 11 I.L.M. 470 (Article 11 provides that a state is not immune from action seeking redress for injury or damage to property "if the facts which occasioned the injury or damage occurred in the territory of the State of the forum, and if the author of the injury or damage was present in that territory at the time when those facts occurred"), *available at* http://conventions.coe.int/Treaty/en/Treaties/Html/074.htm; *Report of the International Law Commission on the work of its thirty-sixth session, 7 May - 27 July 1984*, U.N. GAOR, 39th Sess., Supp. No. 10, at 62, 66-67, U.N. Doc. A/39/10 (1984) (provisionally adopting similar article; emphasizing goal of excluding actions taken in one state that cause injury in forum state and noting importance of that exclusion to principle of *lex loci delicti commissi*), *available at* http://untreaty.un.org/ile/documentation/english/A_39_10.pdf

Applied here, that inference compels the conclusion that Congress did not intend the torts exception to vitiate sovereign immunity for acts undertaken by foreign states outside the United States. *See id.* Yet petitioners would use that exception to attempt to hold Saudi Arabia and its officials and instrumentalities liable on the basis of activities supposedly undertaken outside the United States (primarily in Saudi Arabia). Because such allegations are not cognizable under the torts exception, the Court could affirm the judgment of the Second Circuit without reaching the issue that petitioners seek to present.

B. The torts exception is also inapplicable here because, as the district court held below, the actions that Saudi Arabia and its officials and instrumentalities are alleged to have taken involve the exercise of discretion. *See* 28 U.S.C. § 1605(a)(5)(A) (excluding from torts exception "any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused").

The purpose of discretionary-function immunity is to "prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *Varig Airlines*, 467 U.S. at 814 (construing Federal Tort Claims Act's comparable discretionary-function limitation, on which the FSIA's provision was modeled). Petitioners' claims against Saudi Arabia are based primarily on contributions and other support the Saudi government is alleged to have provided to Islamic charities that in turn are alleged to have funded al Qaeda. But the Saudi government's decisions to support Islamic charities, and its determination of which charities to support,

are integral aspects of Saudi Arabia's leadership role in the Islamic world. As the district court recognized, those decisions are accordingly imbued with social and political policy dimensions and are thus immune from challenge under the FSIA. *See* Pet. App. 167a (Saudi Arabia's "treatment of and decisions to support Islamic charities are purely planning level 'decisions grounded in social, economic, and political policy'" and are accordingly immune from suit under discretionary-function immunity) (quoting *Varig Airlines*, 467 U.S. at 814).

The same is true with respect to petitioners' allegation that Saudi Arabia facilitated the growth and development of al Qaeda through alleged links to the Taliban. According to petitioners, Saudi Arabia "extended formal diplomatic relations to the Taliban, and provided funding and logistical support to sustain the regime," knowing and intending "that the financial and logistical support it provided to the Taliban would materially benefit al Qaida." Compl. ¶¶ 406-407. As one court has already held, it is "nearly self-evident," *Burnett*, 292 F. Supp. 2d at 20, that such alleged acts implicate official discretion in carrying out the foreign relations and international security policies of Saudi Arabia and are thus not subject to attack through a tort suit.

The SHC's use of funds is likewise discretionary. As the district court held, the "undisputed evidence" established that the SHC's decisions regarding the distribution of humanitarian funds were discretionary and influenced by Saudi Arabia's policies toward Bosnia-Herzegovina. Pet. App. 72a. The SHC's decision-making falls squarely within the discretionary-function exception and cannot be the basis for a tort claim.

Because petitioners cannot satisfy the FSIA's torts exception in any event – both because the torts exception applies only where the challenged actions occurred in the United States and because it excludes discretionary activity – there would be no point in granting certiorari in this case to review the question whether petitioners can use that exception to circumvent the limitations in the terrorism exception.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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December 30, 2008